Reportable

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Exercising its Admiralty Jurisdiction

Case No: 181/06

In the matter between:

THE MT "FOTIY KRYLOV" Applicant

and

THE OWNERS OF THE MT "RUBY DELIVERER" Respondent

JUDGMENT: 12 February 2008

DAVIS J

The applicant ,the bareboat charterer of the MT "Fotiy Krylov" had applied for an order setting aside the respondent's arrest of this vessel on 10 November 2006 pursuant to which it commence an action *in rem* against the vessel under Case No. AC181/06 for damages allegedly arising out of a collision between the MT "Nikolay Chiker" and the MT "Ruby Deliverer" on the 16 August 2005 .The applicant asserts that the respondent does not enjoy a *maritime lien* in respect of its claim and therefore has not

made out a *prima facie* case in respect of its claim.

In the alternative, in the event of the arrest not being set aside, the applicant prays that the amount of security furnished to the respondent in order to procure the release of the MT "Fotiy Krylov" from arrest be reduced.

Factual Matrix

A number of facts are common cause and can be summarized accordingly:

On 16 August 2005 the tug MT "Nikoly Chiker"collided with the MT "Ruby Deliverer" off Cape Town. At the time of the collision, the "Ruby Deliverer" was owned by Bluebottle Navigation Limited ("Bluebottle").

The "Nikolay Chiker" was owed by Sovracht Joint Stock Company and bareboat (or demise) charterered to the applicant, Tsavliris Russ (World Wide Salvage and Towing) Limited ("Tsavliris"). On or about 10 November 2006 Bluebottle caused the tug "Fotiy Krylov " to be arrested, thereby instituting an action in rem in which Bluebottle claimed payment of the sum of UU$1 625 716,06 together with interest and costs
.

In its writ of Summons, Bluebottle contended as follows:

1. The collision between the "Ruby Deliverer" and the "Nikolay Chiker" occurred as a result of the negligence of the master and crew of the "Nikolay Chiker."

2. Bluebottle had a maritime lien enforced against the "Nikolay Chiker ".

3. At the time of its arrest the Fotiy Krylov was owned by Sovracht Joint Stock Company and bareboat chartered to Tsavliris

4. Bluebottle therefore was entitled to commence its action against the "Fotiy Krylov" as an associated ship of the "Nikolay Chicker".

On 16 November 2006, security was furnished by United Kingdom Mutual Team Ship

Insurance Association, on behalf of Tsavliris, and the "Fotiy Krylov" was released from its arrest.

The "Fotiy Krylov" was therefore deemed to be under arrest in terms of section 3(10) of the Admirality Jurisdiction Regulation Act 105 of 1983 as amended ("Admiralty Act")

On 4 July 2007 Tsavliris, citing itself as the MT "FOTIY KRYLOV", launched an application to set aside the deemed arrest of the "Fotiy Krylov".

The grounds upon which the application to set aside the arrest were the following:

1 If the collision was caused by the negligence of the master and /or crew of the "Nikolay Chiker" as alleged in the summons (which was denied), such negligence constituted a breach of a contractual duty which gave rise to the maritime lien upon which Bluebottle's action was based. The applicant did not persist with this argument.

2 In terms of the contract that governs the right and liabilities of Bluebottle and Tsavliris in relation to the collision, the claim was time –barred and, in any event, subject to the exclusive jurisdiction of the High Court of Justice in London .

3 In terms of the contract pursuant to which Bluebottle hired the "Nikolay Chiker", Tsavliris was exempt from all liability for the damage to the "Ruby Deliverer" of whatsoever nature and howsoever caused.

With regard to the contract that governed the rights and obligations of Bluebottle on the one hand and Tsavliris on the other ,it was alleged in the founding affidavit filed in support of the application to set aside the arrest as follows : On 15 August Bluebottle and Tsavliris concluded an agreement,part oral and part in writing (the TOWHIRE contract) for the provision of certain supply and towage service in respect of the "Ruby Deliverer" and a submersible oil rig known as either "P-22" or Petrbras 22 ("the rig")

In concluding the contract , the Bluebottle was represented by Mr Phillip Bush of

Bush Shipping who in turn acted by way of a local salvage and towage brokers, Captain Needham.
The terms of the standard BIMCO International Towage (Daily Hire) ("TOWHIRE")

Agreement were incorporated into the fixture, save where the TOWHIRE terms were inconsistent with the fixture.

Clause 18(2) (b) of the TOWHIRE clauses exempted Tsavliris from loss or damage

of whatsoever nature, caused by or to the tow.

Clause 24 of the TOWHIRE terms provided, inter alia, that any claim arising out of the towage or service performed thereunder shall be brought within a year, failing which the rights of the claimant shall be absolutely time barred or extinguished. As Bluebottle commenced its action on 10 November 2006, more than one year after the collision occurred on 16 August 2005, it was contended that its claim had prescribed.

Clause 25 of the TOWHIRE term provided that any dispute or difference which may arise out of or in connection with the agreement should be referred to the High Court of Justice in London, and that no suit should be brought in any state or jurisdiction save for proceedings *in rem* to obtain conservatory seizure or other similar remedy against any vessel properly owned by the other party in a state of jurisdiction where such vessel or property may be found. In the circumstances, Bluebottle was precluded from arresting an associated ship in proceedings *in rem* in contravention of this clause.

In the alternative , and in the event of the Court deciding to set aside Bluebottle's arrest the "Fotiy Krylov", Tsavliris prayed that the amount of security furnished in order to procure the release of the "Fotiy Krylov" from arrest and should be reduced.

In answer to the allegations made in the founding affidavit, Mr Bush deposed to an answering affidavit in which he alleged as follows:

1 The fact that Tsavliris was the bareboat charter and operator of the" Nikolay Chiker", and consequently employed the master and crew, and was vicariously liable for their negligence, did not alter the fact that the underlying claim is a claim *in rem* for which the owner of the vessel is liable.

2 Even if there was a contract between Bluebottle and Tsavliris which incorporated the TOWHIRE terms, which had been denied, and even if the terms of that contract prevented Bluebottle from claiming against Tsavliris for the damages which it suffered, that would not constitute a defence to claim against the vessel in rem.

3 The hirer under the TOWHIRE contract was not Bluebottle but Arusha Shipping Limited ("Arusha"), the owner of the rig that was towed. In this regard:

3.1 On 15 February 2005 Bluebottle concluded an agreement on the TOWCON form ("the TOWCON contract") with Arusha for the towing of the rig from Brazil to India or Pakistan.

3.2 In terms of clause 3 (b) (iii) of the TOWCON contract Arusha was liable to pay the cost of the services of assisting tugs , when deemed necessary by the master of the "Ruby Deliverer" or prescribed by the port authority.

3.3 In terms of clause 17 (b) of the TOWCON contract the "Ruby Deliverer" was at all times at liberty to call at any port or place for bankers provided that the tug was obliged to leave the tow in a safe place and during the period the TOWCON contract would remain of full force and effect .

3.4 As the "RUBY Deliverer" and the rig were nearing Cape Town, Mr Bush arranged for the supply boat, the "North Star" to take bunkers out to the "Ruby Deliverer" and to wait near the rig while the "Ruby Deliverer" went into Cape Town to complete her bunkering and to take on stores.

3.5 The South African Maritime Safety Authority ("SAMSA") became aware of the arrangements and intervened. SAMSA insisted that it would not permit the operation to proceed unless a holding tug was employed which would hold the rig whilst the "Ruby Deliverer" entered Cape Town for bunkers.

3.6 Mr Bush, acting for and on behalf of Arusha , and using Captain Needham as a 'go –between', concluded the TOWHIRE contract with Tsavliris .

4 Certain other grounds of opposition were also advanced, namely

4.3 The applicant is cited as "MT "Fotiy Krylov". Tsavliris is not the owner of the "Fotiy Krylov" and describes itself merely as the operator .Mr Winstain Tsavliris' attorney, did not indicate that he had authority from the owner of the "Fotiy Krylov" to bring the application.

4.4 It is not competent for the vessel to be cited as the applicant. It is only a legal personality that can properly be the applicant.

In his replying affidavit, deposed to on behalf of Tsavliris, Mr Winstain averred as follows:

1 It is not disputed ,for the purposes of the applicaton ,that the "Fotiy Krylov" was an associated ship to the "Nikolay Chiker" as described in section 3 (6) and (7) of the Admiralty Act.

2 With regard to Bluebottle's assertion that it enjoys a maritime lien in respect of its claim:

2.1 The maritime lien relied upon by Bluebottle is the damage maritime lien.

2.2 The maritime lien gives rise to a right of recourse against the defendant ship itself. It does not result in personal liability of the owner of the defendant ship.

2.3 In order for the damage maritime lien to exist there must have been a breach of a duty by those in control of the wrongdoing ship so that the ship became an instrument of damage; it is common cause that Tsavliris was, at the relevant time, the employer of the master and crew of the "Nikolay Chiker".

2.4 The breach must, however, be such as to render the owner of the guilty ship liable, either directly or vicariously.

2.5 In the case of a bareboat charterer the lien attaches even though the charterer, not the owner is liable for the breach of duty. Accordingly, any maritime lien that Bluebottle might assert must arise from the breach of duty by Tsavliris as the bareboat charterer of the "Nikolay Chiker".

2.6 If, by virtue of a contractual exemption, the owner or bareboat charterer is exempt from liability then the claimant has no maritime lien in respect of its claims; or if the claim against the owner of the bareboat charterer has prescribed the claim cannot be prosecuted on the basis of the maritime lien.

2.7 Tsavliris contends that it contracted with Bluebottle on the terms set out in the TOWHIRE contract. However,even if the allegations made by Mr Bush are accepted, Tsavliris' liability for the damage to the "Ruby Deliverer" is also excluded by virtue of the terms of the TOWCON agreement.

BURDEN OF PROOF

Although Tsavliris has applied to set aside Bluebottle's arrest of the "Fotiy Krylov" ,it remains incumbent upon Bluebottle to demonstrate, on a balance of probabilities, that the "Fotiy Krylov", at the time of its arrest, was an associate ship to the "Nikolay Chiker" as described in section 3(6) and (7)of the Admiralty Act; and it has a *prima facie* case on the merits of its claim i.e. it had to tender evidence which ,if accepted, established a cause of action.

Preliminary Objections

Respondent raised two preliminary objections to the application, being the authority to bring the application and the citation of the applicant. I shall deal with these two issues before analyzing the substance of the dispute.

Mr Stewart, who appeared on behalf of respondent, submitted although the application to set aside the arrest was said to be the MT "Fotiy Krylov," the applicant both in fact and substance was T*savliris.* He noted that the deponent to the founding affidavit, Mr Winstain, had received his authority from Tsavliris and had put up a power of attorney from the latter. Tsavliris relied on the authority given to it by *Sovraght.*

The question was that, even if in form the applicant was the "Fotiy Krylov", in substance it appeared to be Tsavliris. Mr Wragge, who appeared on behalf of the appellant, noted that in terms of clause 15 of the bareboat charter party, Tsavliris arranged for the vessel's protection and indemnity insurer U K P I Club to put up security in order to procure the release of the "Fotiy Krylov" from arrest. However, as Mr Wragge observed, it is customary that the protection indemnity insurance provided by the Club covered only one quarter of the insured collision liability. The remaining

three quarters was covered by the vessel's harbor and machinery insurer .Accordingly, Tsavliris was obliged to provide counter security to the Club before it would agree to furnish a letter of undertaking to procure the release of the vessel from arrest.

Mr Wragge submitted that Tsavliris therefore had a real and substantial interest in the arrest of the "Fotiy Krylov"and in the security furnished in order to procure to procure the release of the vessel from arrest.

Bluebottle accepted in its reply, at the very least that Tsavliris established that it had *locus standi* to bring the application to set aside the arrest, notwithstanding that it was not the owner of the vessel although the correctness or appropriateness of it doing so in the name of the vessel was not accepted by the respondent.

In its citation of the applicant, applicant has been cited as the MT "Fotiy Krylov". Bluebottle disputed that it was competent for a vessel to be cited as an applicant *in rem*. Refering to the judgment in *Tao Men* 1996 (1) S A 559(C) at 566, Mr Wragge contended that , where an application is bought to set aside the arrest in the name of the ship , an objection that the ship had no juristic personality , hence no *locus standi* to bring the application , was treated as a technical triviality and accordingly not upheld . Further, the court held that an respondent, such as Bluebottle in this case, chose to bring an action *in rem* citing the vessel as defendant. In that case, the application to set aside the arrest was treated as a first hearing of the matter. If a ship is cited as a defendant, it must be possible for the person resisting the arrest to appear either on paper or in person to challenge this arrest.

These objectives do not therefore stand in the way of the application. I now turn to the substance of the dispute.

The Damage Maritime Lien

For the purpose of the institution of an action *in rem,* against the "Fotiy Krylov", Bluebottle has relied upon an assertion that it enjoys a *maritime lien* in respect of its claim over the "Nikolay Chiker".

A maritime lien has been defined as "a claim of privilege upon a thing carried into effect by an action *in rem*, such claim or privilege traveling with the thing into whosever's possession it may come. It is inchoate from the moment the claim or privilege attaches and, when carried into effect by legal process by a proceeding *in rem,* relates back to the period when it first attached." The "Bold Buccleugh"[1843-60]All ER Reprint 125 See also G Hofmeyr Admiralty jurisdiction law and practice in South Africa (2006) at148.

The damage maritime lien upon which Bluebottle relies for the institution of its action in rem against the "Fotiy Krylov "is a lien for "damage done by a ship" which is a maritime lien in terms of section 1 (1) (e) of the Admiralty Act . Section 6 (1) of the Act provides that the scope of the lien falls to be determined by reference to the English admiralty law as it stood on 1 November 1983.

Hofmeyr at 153-154 sets out the requirements which have to be satisfied before a damage maritime lien can exist as follows:

(1) The damage must have been caused by a breach of duty by those in control of the ship and the breach of duty would only give rise to the lien if the ship itself the instrument of damage.
(2) The damage lien does not arise from the mere fact that damage is done by a ship, or that the wrongdoing ship was the instrument of damage. Broadly, it must be shown that the damage complained of a direct or consequential result of the breach of duty on the part of is a person in lawful charge or control of the wrongdoing ship.

3) Subject to an exception, the personal liability of the *res* owner is a condition precedent to the accrual of a damage claim.

Regarding the exception, Hofmeyr at 154-155 writes as follows: "Under the early English maritime law inherited in the Republic there was an exception to the rule that no *lien* arises unless the owner is liable for the breach of duty giving rise to the claim, namely, in the case of a charter by demise .In a case of a charter by demise the *lien* attached even though the charterer and not the owner was liable for the breach of duty. The exception has, despite some misgivings, been adopted in subsequent English cases. In the absence of judicial reexamination of the basis for the exception, it must be taken to be part of the English law as of 1983 and thus part of the admiralty law of the Republic".

Mr Wragge's submitted that, if there are provisions in a contract pursuant to which the bareboat charterer of the chartered ship is relieved of the responsibility of the damage, then in such circumstances no damage *lien* accrues. Notwithstanding that Bluebottle's claim is asserted by way of an action *in rem*, this does not render the owner of the "Fotiy Krylov" liable. If , by reason of a contractual provision in terms of the agreement entered into between Bush and *Tsavliris,* the latter is relieved of any liability to Bluebottle for damage arising from a collision between the "Ruby Deliverer" and the "Nikolay Chiker ,"it must follow that Bluebottle does not enjoy a maritime lien in respect of its claim. Accordingly, Mr Wragge submitted, Bluebottle was not entitled to rely on section 3 (4) (a) of the Admiralty Act to institute an action in rem against the Fotiy Krylov .
In summary, while it was conceded by applicants that (1) Bluebottle had to do no more than make out a prima facie case ,meaning that it need show no more than that there is evidence , which if accepted ,will establish a cause of action, (2) it had made out such a case that the collision between the "Fotiy Krylov" and the "Nikolay Chiker" was caused by the negligence of the master and crew of the latter ,there was a provision in the relevant contract that relieved Tsavliris of any liability to Bluebottle for damage arising from the collision .

In order to substantiate the argument of the existence of a provision in the contract by which *Tsavliris* was relieved of any liability to Bluebottle for damage arising out of such a collision, Mr Wragge sought reliance on time bar and jurisdiction clauses,a so-called Himalaya clause in the TOWCON contract between *Arusha* and Bluebottle for the towing of the Peprobras XX11 from Brazil to India or Pakistan.

The Himalaya Clause

The material terms of the TOWCON agreement with Arusha as the hirer and Bluebottle as the tug owner can be summarized thus:

The tug owner would tow the rig (which was defined as being the tow by the Ruby Deliverer) from Brazil to India or Pakistan .Save for obligations regarding payment, making the tow available for towing accepting the tow at the destination, the furnishing of permits and certification and making the two tow-worthy , the hirer had no obligation in terms of the contract.

All the obligations with regard to getting the tow to its destination fell upon the tug owner.

Clause 19 of that agreement which included the Himalaya clause reads thus:

"All exceptions, exemptions, defences, immunities, limitations of liability , indemnities, privileges and conditions granted or provided by this Agreement or by any applicable statute rule or regulation for the benefit of the Tugowner or Hirer shall also apply to and be for the benefit of demise charterers ,sub contractors, operators ,masters, officers and crew of the Tug or Tow and to and be for the benefit of all bodies corporate ,parent of, subsidiary to ,affiliated with or under the same management as either of them, as well as all directors, officers ,servants and agents of the same and to and be for the benefit of all parties performing services within the scope of his Agreement for or on behalf of the Tug or Tug owner of Hirer as servants, agents and sub contractors of such parties. The Tugowner or Hirer shall be deemed to be acting as agent or trustee of and for the benefit of all such persons, entities and vessels set forth above but only for the limited purpose of contracting for the extension of such benefits to such person, body or vessels".

In terms of clause 18 of the TOWCON contract, Bluebottle and Arusha intended by the terms of the contract to protect their sub contractors such as Tsavliris .The clause also expressly provided that Bluebottle contract as agent or trustee of and for the benefit of sub contractors such as Tsavliris .

Mr Wragge submitted with regard to authority, that the ratification by Tsavliris of the agreement was sufficient. This ratification occurred when the "Nikolay Chiker" was made available to render the services in terms of the TOWHIRE contract, alternatively at a later stage.

Mr Wragge submitted that, by virtue of the Himalaya clause, Tsavliris was entitled to the benefit of 'all exceptions, exemptions, defenses, immunities, limitations, of liability, indemnities, privileges and conditions granted or provided by the TOWCON. Clause 24 of the contract, entitled "Time for Suit" clause provides that if a suit is not brought within one year of the time when the cause of action first arose , "all rights whatsoever and howsoever shall be absolutely barred and extinguished".
Clause 25 of the contract provided for the law and jurisdiction in relation to the agreement. *Inter alia* it reads:

"This agreement shall be construed in accordance with and governed by English law. Any dispute or difference which may arise out of or in connection with this Agreement or the services to be performed hereunder shall be referred to the High Court of Justice in London.

No suit shall be brought in any other state of jurisdiction except that either party shall have the option to bring proceeding *in rem* to obtain conservative seizure or any similar remedy against any vessel or property owned by the other party in any state or jurisdiction where such vessel or property may be found."

Mr Wragge accepted that the action commenced by Bluebottle in the present dispute could be regarded as a "proceeding *in rem* to obtain conservative seizure". However it was not brought against property owned by Tsavliris .Accordingly, *Tsavliri*s was entitled to rely upon the second part of the exclusive jurisdiction clause. This constituted a defence or privilege and therefore Tsavliris was entitled to rely upon the provision of the exclusive jurisdiction clause for its benefit.
On this basis, Mr Wragge contended that, on Mr Bush's version as set out in the answering affidavit, Bluebottle had not made out a *prima facie* case in respect of its claim against *Tsavliris.* The latter was entitled to rely upon the provisions of the TOWCON agreement stipulated for the benefit of both Arusha and Bluebottle, and further, any action which Bluebottle might have had against either *Tsavliris* was prescribed by virtue of the provisions of clause 24 or was prohibited by the provisions of clause 25 of the agreement as set out.

RESPONDENT'S CONTENTIONS
Mr Stewart submitted that there were a number of reasons why the Himalaya clause could not be employed by T*savlaris* in seeking the release to the Fotiy Krylov from arrest, any of which, if upheld , would defeat the application to set the arrest aside.

On this basis, he submitted that the action was not against *Tsavliris*. The action was an action *in rem* against the "Fotiy Krylov" based on the damage *maritime lien* that Bluebottle enjoyed against the "Nikolay Chiker" Even though the appearance to defend was entered by *Tsavliris* on behalf of the vessel, Mr Stewart contended that the action *in rem* was not transformed into an action *personam* against *Tsavliris,* with the result

that, even if there was an applicable time-bar clause preventing Bluebottle from bringing any proceedings against *Tsavliris,* this time bar clause could not operate to protect the vessel in an action ***in rem*** .

In this connection Mr Stewart relied upon the case of The Ripon City 8 Asp. Mar. Law Cas 304(1897) where at 310 Gorell Barnes J in the Admiralty Court held that parties who receive damage from a ship had "by the maritime law of nations a remedy against the ship itself" and that the right to enforce a maritime lien "is different from the right of arrest to compel appearance and security in this, that it is confined to the property by means of which the damage is caused, and may be enforced against the hands of an innocent purchaser".

Further he said at 311:

"It is the right acquired by one over a thing belonging to another - a *jus in re aliena.* It is, so to speak, a subtraction from the absolute property of the owner in the thing .This right must therefore in some way have been derived from the owner either directly or through the acts of persons deriving their authority from the owner. The person who acquired the right cannot be deprived of it by alienation of the thing by the owner. It does not follow that a right to a personal claim against the owner of the *res* always coexists with a right against the *res.* The right against the *res* may be conferred on such terms or under such circumstances that a person acquiring that right obtains the security of the *res* alone ,and no right against the owner thereof personally. …Some of the cases I have examined above show that where the owners of a ship have vested the control of a vessel in the charterers the latter are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers. (*The Ticonderoga* [Swab.215*] and The Lemington*[2 Asp. Mar. Law Cas .475])."

On this basis Mr Stewart submitted that, even if the charterers were themselves not liable, because they had the authority of the owners in being in control and possession of the ship, the ***res*** itself will be susceptible to the damage maritime lien. See also The Father Thames [1979] 2 Lloyd's Rep 364 (QB).
In Mr Stewart's view, Tsavliris' approach to the problem was to engage from the wrong end by asserting that, because the liability of the ship stems from the negligence of the Master and /or crew employed by it, a contractual defence that it may have to the claim will be a defence available to the ship itself and possibly the owners of the ship *qua* owners .In his view, the cases cited by him established that the ship may be liable even if the ownership has since changed. Thus, it could not be that the *in personam* liability of the charterers of the ship on demise charter is a prerequisite to establish the liability of the ship .The negligence of the Master and /or crew of the ship, who had possession and control of the ship with the consent or authority of the owners, regardless of who employed them, established the liability of the ship.
Mr Stewart further submitted that the Himalaya clause in question did not meet one of the requirements for the applicability of the Himalaya clause , namely that it was clear

by its terms that it was not intended to apply to a party in the position of *Tsavliris* .The reason for this is simply that *Tsavliris* was not a party "performing services within the scope of the TOWCON agreement", other than to pay Bluebottle for any additional expenses incurred by the latter for the services of any assisting tugs, *Arush*a had no obligation of performance under the TOWCON that related in any way to what *Tsavliris* undertook to do and to what he did so do .In other words, in performing under the TOWHIRE agreement , *Tsavliris* was not performing an obligation of *Arusha* 's to Bluebottle under the TOWCON agreements and was therefore not a servant ,agent or sub-contractor of Arusha performing services under TOWCON .
In Mr Stewart's view, what occurred was that Arusha contracted with Tsavliris for the services of the "Nikolay Chiker", but Arusha did not do so in order to perform some obligation that it had to Bluebottle. *Tsavliris* was accordingly not a sub- contractor of Arusha's at all , and certainly not within the meaning of clause 19 of the TOWCON.

Mr Stewart also contended that, since both the TOWCON and the TOWHIRE agreements were governed by English law, the requirements for the applicability of the Himalaya clause under the English law had to be established .One of those requirements was that the party seeking to rely on the clause in question must be given "consideration" therefore. See Scruttons Ltd v Midland Silicones Ltd [1962] 1 ALL ER 1(HL) at 10.
There has been no allegation by Tsavliris that any consideration had been given, let alone proved, from which the giving of consideration could be inferred. In these circumstances, it could not be said that there was a contract between Bluebottle and Tsavliris. In this case the contract was between Arusha and Tsavliris.
Finally, Mr Stewart submitted that the exclusive jurisdiction clause 25 of the TOWCON agreement, was not amongst the "exceptions, exemptions, defences, immunities, limitations of liability indemnities, privileges and conditions granted or provided" by a TOWCON because it did not benefit only one party but embodied a neutral agreement under which both parties agreed with each other as to the relevant jurisdiction for the resolution of disputes. It was therefore a clause that created mutual rights and obligations.
He contended that proceedings *in rem* are expressly excluded from the ambit of an exclusive jurisdiction clause with the result that Bluebottle was not prevented by that clause from bringing the current proceedings. Therefore, there was no contractual bar to Bluebottles' action *in rem* against the MT"Fotiy Krylov". Accordingly the application that the arrest be set aside should be dismissed.

EVALUATION

A key case cited by Mr Wragge in support of the proposition that, if there is a provision

in the contract pursuant to which the bareboat charterer of the chartered ship is relieved

of responsibility for damage, no damage lien then accrues was that of the Tasmania

(1888) 6 Asp LR 305.

This was case cited in the Ripon City which in turn was much emphasized by Mr Stewart.
In the former case the tug, Tasmania, was demise chartered .It caused damage to a fishing smack belonging to plaintiff. The charter contained the following provisions:
"They will tow vessels, boats or other crafts by the above-named steamtugs on the following conditions only: That they are not to be answerable or accountable for any loss or damage whatever which may happen to or be occasioned by any vessel, boat, or craft, or any of the cargoes on board the same, while such vessel, boat, or craft is in tow of either of the steamtugs whether arising from the of occasioned by any supposed negligence or default of them or their servants, or defects or imperfections in the said steamtugs or either of them, or the machinery or any other part of the same, or any delay, stoppage, or slackness of the speed of the same, however occasioned, or for what purpose wheresoever taking place; and that the owner or persons interested in the vesels, boats, or crafts, or of the cargoes on board the same so towing, undertake, bear, satisfy and indemnify the said tug-owners against the same."

It was argued for the plaintiff in the Tasmania that the clause did not apply to the negligence of the company servants in the navigation of the Tasmania as distinguished from the tugs belonging to the company. Further, as this was an action *in rem*, plaintiff was entitled to recover against the ship and through the ship against the owner of the tug, notwithstanding the chartering of the tug to the tug company and the plaintiff's dealings with that company. Dealing with these arguments Sir James Hannen said, at 309:
" The result of the authorities cited appears to me to be this, that the maritime lien resulting from collision is not absolute. It is a *prima facie* liability of the ship which may be rebutted by showing that the injury was done by the act of someone navigating the ship not deriving his authority from owners, and that by maritime law charterers in whom the owners are deemed to have derived their authority from the owners so as to make the ship liable for the negligence of the charterers, who are *pro hac vice* owners. These propositions do not lead to the conclusion that where, as between the charterers and the persons injured, the charterers are not liable, the ship remains liable nevertheless. On the contrary, I draw from these premises that whatever is a good defence of the charterers against the claim of injured person is a good defences for the ship, as it would have been if the same defence had arisen between the owners and the injured person."

This key finding in the Tasmania appears to support the contentions of Mr Wragge. By contrast, Mr Stewart cited The Longford 6 Asp. Ma. r Law. Cas 371 (1889) and the later case of The Burns 10 Asp. Mar. Law.Cas. 424 (1907) to the effect that the lien remains available because the ship is liable, irrespective of whether the bareboat charter

can not be held to be liable .As Moulton LJ said in The Burns at 428 " I am of the opinion that …the action *in rem* under the circumstances is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defense of their property, but it is a matter for them to decide upon and if they do not decide to make themselves parties to the suit in order to defend their property there is no personal liability against them that can be established in that action. It is perfectly true that the action indirectly affects them. So it would if it was an action against a person whom they had identified".
Mr. Stewart's contention can be summarized thus: the basis of the lien flowed from the running of the ship by those with the authority to run the ship; that is with authority granted by the owner. It was the very running of the ship that gave rise to the liability.

The decision in the *Tasmania* appears to be good law for the purpose of the applicable law to determine the present dispute in that both The Longford and The Burns do not appear to deal with the direct issue of a clause which covers an action *in rem.* Both The Longford and The Burns dealt with a time bar clause contained in legislation. In both cases, the courts read the legislation to cover only an action *in personam.* In the present case, the dispute turns on a contractual provision (hence the importance of the *Tasmania*) and the wording thereof does not appear to sustain the distinction drawn in The Longford and The Burns, a distinction which trumped the applicable legislation.

The question still arises as to whether Mr. Stewart's objection that *Tsavliris* was not a party performing a service with in the scope of the TOWCON means that the Himalaya clause cannot be rendered applicable to the present dispute.
It would appear that agents and sub-contractors and parties to such a contract are given protection if (1) the contract makes clear that the contracting party intended , by its terms, to protect the defendant, (2) the contracting party contracted for the defendant's protection as well as for his own (3) the authority of the carrier to act for the defendant either anti sedently or by ratification is made out .See Santam Insurance Company Ltd v S A Stevedores Ltd 1989 (1) SA182(D) at 189-190.

A commercial orientated approach to these clauses which supports this interpretation is evident in the judgment of Lord Steyn in Starsin [2003] 1 Lloyd's Rep 571 (HL) at 585.

" When in ITO *Ltd. v. Mida Electronics Inc*., 28 D.L. R. (4^{th}) 641 the Supreme Court of Canada followed *The Eurymedon*, McIntyre, J. commented (at p. 667):

> Himalaya clauses have become accepted as a part of the commercial law of many of the leading trading nations, including Great Brattain, the United States, Australia, New Zealand, and now in Canada. It is thus desirable that the courts

> avoid construction of contractual documents which would tend to defeat them. I would therefore accept the approach taken by Lord Wilberforce and, in doing so; I observe that the court is simply giving effect to that which the parties themselves clearly agreed to in writing.

This is the approach which should be adopted in the case before the House.

In my view the arguments of the cargo-owners are of the very type which Lord Wilberforce warned against. I would respectfully also echo an extra-judicial statement by Lord Goff of Chiveley in Commercial Contracts and the Commercial Court (1984) LMCLQ 382, 391:

> We are there to help businessmen, not to hinder them; we are there to give effect to their transactions, not to frustrate them; we are there to oil the wheels of commerce, not to put a spanner in the works, or even grit in the oil.

This is a particularly apposite observation in regard to the ground-breaking development in *The Eurymedon* [1974] 1 Lloyds Report 354 (PC)] . The difficulties created in international trade by the doctrines of privity of contract and consideration had to be overcome. Those doctrines obstructed the process of giving effect to the reasonable expectations of parties. Fortunately, as was pointed out in *ITO*, at p. 667, by McIntyre, J., "one of the virtues of law is that it has never let pure logic get in the way of common sense and practical necessity when a desirable result is sought to be achieved." The desired result was to give businessmen the freedom to make arrangements for the allocations of risks as they thought right. The decisions in *The Eurymedon* and *The New York Star* were taken in the context of classical English contract law. It is true that this result can now be achieved more simply and directly by a combination of the Carriage of Goods by Sea Act, 1992 and the Contracts (Rights of Third Parties) Act, 1999. Nevertheless, the plain objectives of the decisions in *The Eurymedon* and *The New York Star* was to enable businessmen to make sensible and just commercial arrangements, and thereby further international trade. Legal policy favours the furtherance of international trade. Commercial men must be given the utmost liberty of contracting. They must be left free to decide on the allocate commercial risks. In my view there can be no good reason to set at naught on an interpretative basis the allocation of risk in the Himalaya clause.

The factual background, relevant to this issue, is set out in the answering affidavit of Mr Phillip Bush ,a director of Bluebottle .He states that on 15 February 2005 he concluded a TOWCON contract on behalf of Bluebottle with Arusha for the towing of the Petrobras XXII by the vessel the "Ruby Deliverer" from Brazil to India or Pakistan .In terms of clause 3 (b)(iii) of the TOWCON, the hirer shall pay ,as and when they fall due, the cost of the services of any assisting tugs when deemed necessary by the Tug

Master as prescribed by Port or other Authorities. Mr Bush states that, "where during the course of the tow the tug requires to enter a port for bunkers all costs associated therewith will be for the hirer's account and the tug will still earn its hire... If it was necessary to employ another tug to keep the rig safe whilst the original tug is bunkered, that cost too will be for the hirer and it would make perfect sense for the hirer to contract for the holding tugs services. "

Mr Bush states further as the Petrobras XXII was approaching Cape Town under tow by the "Ruby Deliverer" he made arrangements on behalf of Arusha with the owner of a supply boat the "North Star" to take bunkers out to the "Ruby Deliverer" and to wait near the "Petrobras" while the "Ruby Deliverer" went to Cape Town to complete her bunkering and to take on stores.
At this point the South African Maritime Safety Authority (SAMSA) intervened and "insisted that it would not permit the operation to proceed unless the holding tug was employed which would hold the rig while the "Ruby Deliverer" entered Cape Town for bunkers… I spoke to him (Needham) about finding a suitable tug to hold the rig to enable the "Ruby Deliverer" to enter Cape Town. Needham came back to me and suggested that the "Nikolay Chiker" operated by Tsavliris would be available for the purpose. Needham was accordingly used as a go between to myself on behalf of Arusha on one hand and Tsavliris on the other for the purpose of agreeing terms to fix the "Nikolay Chiker". He did not act as a broker on behalf of the hirer and received no remuneration from me or those I represented for his services. I assume he was remunerated by Tsavliris. "
Mr Wragge submitted that the agreement between Arusha and Bluebottle for services to be rendered by Tsavliris in respect of the tug fell within the scope of the very same agreement. While it might not be clear as to why Arusha contracted the agreement rather than Bluebottle, this is not relevant to the dispute. What is relevant is that a contract was concluded and that it was so contracted and further that it took place within the context of the broader TOWCON agreement, that is to fulfill any obligation to provide assisting tug services.

CONCLUSION

On the version of Mr Bush ,as I have set out, Bluebottle has not made out a *prima facie* case in respect of its claim against *Tsavliri*s which is necessary to establish that there is evidence which if accepted will establish a course of action; a *prima facie* case on the merits of its claim. To summarize: the reason for my conclusion is *that Tsavliris* is entitled, in my view, to rely upon the provision of the TOWCON agreement stipulated for the benefit of both Arusha and Bluebottle and any action that Bluebottle may have

against T*savliris* is either prescribed by virtue of the provisions of clause 24 or is prohibited by the provisions of clause 25 of the agreement as analyzed above.

ORDER

For the reasons set out, the following order is made:

1. The deemed arrest of the MT "Fotiy Krylov" in Case No. AC 181/2006 is set aside
2. Respondent is directed to return the undertaking issued by the United Kingdom Steamship Assurance Association (Burma) Limited dated 16 November 2006 forthwith.
3. The action *in rem* commenced by the respondent against the application under Case No. AC 181/2006 is dismissed.
4. The respondent is directed to pay costs of this application as well as the costs of the application in which an order was issued by this Honourable Court on 16 February 2007 directing that the respondent furnish security for the applicant's costs of defending the action.

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DAVIS J